No. 86-1901

Supreme Court, U.S.
FILED
AUG 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

TAHOE SHOREZONE REPRESENTATION,
Petitioner,

VS.

STATE OF CALIFORNIA, et al.,
Respondents.

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT ON QUESTIONS PRESENTED

The State's Brief in Opposition appears to furnish little, if any, assistance to this Court in determining whether the issues presented by the Petitioners and discussed by Amicus are matters of such significant national and constitutional concern as to justify review by this Court. In an apparent effort to avoid a legitimate discussion of the real issues involved, the State has simply recharacterized the questions presented by the petitions. (See also, Petition No. 86-1877.) Having redefined the questions, the State then responds to the questions thus created and ignores the questions that actually result from the decisions below.

To illustrate, the State, in its Questions Presented, No. 1, suggests that one of the issues is whether the United States Constitution prohibits a state from "*retaining*" a public trust interest in conveyed sovereign lands. No one in this litigation has made such an argument. Rather, Petitioners simply contend that since the State retained no interest in the land between the ordinary high and low water marks when the California Legislature, in 1872, confirmed the dividing line at the ordinary low water mark, it cannot now constitutionally assert such a claim.[1] (Petitioners further contend that the State would now be barred even if the land involved had been part of the bed of Lake Tahoe at statehood which, of course, it was not.)

In Questions Presented, No. 2, the issue is characterized by the State as one of whether a "substantial federal question" is presented when a state court sets a high water mark on a navigable lake. No one representing Petitioners has ever argued that a state court did not have the power, under the proper

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[1] As the California Court of Appeal below recognized:
"The state first asserted claim to the lands at Lake Tahoe in 1977, whereupon this litigation was promptly filed. (*Fogerty*, supra, at p. 243.) Before the state's assertion of its claim in 1977, the owners had no reason to believe the figure of 6229.1 feet was anything more than a limitation on filling the reservoir. They had no cause to suspect it could have further significance as a property boundary for purposes of the public trust doctrine." (App. A at A-12.)

circumstances and in accordance with established law, to determine the location of water marks on the shores of bodies of water, whether they be navigable or non-navigable. The substantial federal question here and the real issue is whether a state court is constitutionally prohibited from unpredictably and without precedent reversing well-established property law in setting those marks where the court's decision has the effect of taking property rights from private owners without compensation and transferring those rights to the State. The further substantial federal question is whether constitutional prohibitions against takings are overcome by *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), or the Equal Footing Doctrine.

In the State's Questions Presented, No. 3, the attempt is made to convert the state court's imposition of an extremely onerous easement onto the private shoreline land involved into a land use regulation case. This unique approach is seemingly based on its unsupported allegations that no government agency has yet taken action to enforce the public's rights under the newly-created public trust easement. The State then contends that the petitions are premature since the issue will not be ripe until each owner proves that the public has, indeed, invaded the land involved. Until now no one has even suggested in this litigation, or generally so far as Petitioner knows, that the taking of an easement by a public agency is permissible without payment so long as the easement is not used. Nor can it legitimately be argued that no payment is required for the appropriation of an easement so long as there is some value left in the encumbered land. The bottom line is that this is not a land use regulation case—the attempt by the State to characterize the taking of an easement as a land use regulation case is novel but inappropriate.

The manner in which the State has attempted to recharacterize the questions presented to this Court is but another example of the zeal and determination afflicting some state agencies and courts in their concerted effort to convert private property to public use without compensation in total disregard of both federal and state constitutional protections. How easy it seems to be for public attorneys and state judges to get caught up on the spirit of "protecting" the shorelines of the nation's waterways from alleged

abuses. How easy to fan the flames of resentment toward those who in good faith acquired lake or river front properties with the *reasonable expectation* that well-established rights in those properties would be respected by both the executive and judicial branches of the state.

The "effective judicial intervention" that is being taught in so many law schools and is the subject of so many "scholarly" articles in regard to how government can acquire private property without payment needs to be turned into "effective judicial intervention" in support of the constitutional rights of private property owners. (See TSR's Petition, p. 18-20.) The granting of the petitions and a full hearing before this Court would appear to be a way to insure that the "tyranny of the majority" will not be used against other shoreline owners throughout the nation to also appropriate their property without compensation.

There appear to be several areas in the Brief in Opposition that justify a limited reply. Ripeness, the *Illinois Central* decision, and matters relating to navigable waters are discussed below.

RIPENESS WAS SATISFIED WHEN THE CALIFORNIA COURT OF APPEAL SET THE LANDWARD BOUNDARY OF THE PUBLIC TRUST EASEMENT AT ELEVATION 6228.75

The transfer of private property interests by the State to the State is now complete. The public trust easement was precisely located on the shoreline of Lake Tahoe when the California Court of Appeal ruled that it encumbered the shoreline up to elevation 6228.75 feet, Lake Tahoe datum. There is no question that the normal, compensated acquisition of an easement by a public agency in private property occurs with the transfer of title. That transfer occurred here by judicial decision. While recognizing that the State made no claim until 1977, and, indeed, had actually disavowed any such claim, that decision, nevertheless, held that shoreline properties are now encumbered with the public trust easement and are "held for the benefit of the public for purposes

of commerce, navigation, fishing, recreation and preservation of the land in its natural state." (See App. A at A-7.)[2]

The State, in its opposition to TSR's 1981 Petition for Certiorari, impliedly recognized that, although the matter was not then ripe for review it would be, once the public trust easement limits were located on the shoreline. The State based its ripeness arguement then on the fact that "issues respecting high and low water lines remained to be tried on remand to the state trial court". (See TSR Petition, p. 8.) This is exactly what has occurred. The California Court of Appeal, in Fogerty II, has precisely defined the location of the public trust easement—nothing remains to be done. Whether or not the State or the public exercises the acquired rights under the public trust easement in any particular way does not change the fact that the easement exists on the private owners' shoreline property and was placed there in November 1986 by the California Court of Appeal.

The State is now attempting to convert this litigation into a land use regulation case. (See, e.g., Brief in Opposition, p. 26.) This is obviously an effort to bolster its ripeness argument. There is no merit to this approach since this is clearly a case involving a physical occupation of the property. It also ignores the fact that the Court of Appeal below held that the State of California had acquired its public trust easement "pursuant to the doctrine of prescription". (See App. A at A-7.) Additionally, as observed in *Summa Corp. v. Calif. ex rel. Lands Comm'n.*, 466 U.S. 198 (1984), the public trust leaves the landowner with little more that a "naked fee", further pointing out that any private use "remains subject to the right of the State or *any member of the public* to assert the State's public trust easement." (*Id.* at 205.) (See also *Marks v. Whitney*, 6 Cal.3d 251, 261 (1971).) In other words, the public trust easement is in place with no further action being required.

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[2] It is not relevant nor is it comforting to Lake Tahoe shoreline owners to be told that the State of California has allowed the area below the ordinary high tide mark at the Pacific Ocean to be the subject of mineral exploration. (See Brief in Opposition, p. 25.)

Nollan v. California Coastal Comm'n., No. 86-133 (June 26, 1987), makes it clear that the appropriation of an easement involves a "permanent physical occupation" rather than a land use regulation:

> "We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." (Slip op. at 6.)

With the decision of the California Court of Appeal, the shoreline owners lost "the right to exclude others". This right has been described over and over as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." (*Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979).) It is difficult to imagine how the issue presented by these petitions could be more ripe for review.

THE CALIFORNIA COURT DECISIONS ARE BASED ON THE ILLINOIS CENTRAL DECISION EVEN THOUGH THAT RELIANCE IS MISPLACED

As indicated in TSR's petition (see p. 5), the California Attorney General advised the California State Lands Commission to claim "sovereign ownership" of the shoreline of all California lakes and rivers up to the "ordinary high water mark". The Attorney General's fallback position was that in the absence of any law to support that claim a public trust easement should be claimed in the same land under the authority of this Court's decision in *Illinois Central*. As described in TSR's petition herein, the California Supreme Court did in fact rely upon *Illinois Central* to support its sudden, startling, unpredictable and unprecedented reversal of well-established California property law relating to shoreline ownership. The reliance on and extreme importance of *Illinois Central* to the California courts in the rulings is perhaps nowhere better demonstrated than by the statement from *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), where the California court ruled that the State's power under the *Illinois Central* case "extends to the revocation of previously granted rights or to the enforcement of

the trust against lands long thought free of the trust" and the further statement that the doctrine defeats "the claim that the establishment of the public trust constitutes a taking for which compensation was required." (*Id.* at 440.)

In answer to Petitioner's plea to this Court that it grant the petitions and set the record straight on the meaning and impact upon state courts of *Illinois Central*, the State has seemingly retreated from reliance on *Illinois Central* and is now attempting to downplay its significance to the California Supreme Court decisions. When the State commenced its claims for the shoreline property, the *Illinois Central* decision was its centerpiece since there was no California law supporting its claim. The California Supreme Court adopted the proposition that *Illinois Central* required the rulings that were eventually made. However, it is somewhat ironic that now, before this Court, and realizing that *Illinois Central* does not support the State's position at all, the State is now suggesting that *Illinois Central* was simply "persuasive support" (See Brief in Opposition, p. 5) and was "approvingly cited in the *Lyon* decision". (See Brief in Opposition, p. 12.)

The State is now frantically attempting to create the impression that pre-existing *state* property law supports its position and that there has been no change in state property law at all. Perhaps the best evidence that the State's present position is unsupported by California law is found in the unrefuted dissents in *State of California v. Superior Court* (*Lyon*), 29 Cal.3d 210 (1981) and *City of Los Angeles v. Venice Peninsula Properties*, 31 Cal.3d 288 (1982), and the critical analysis in *Lyon v. Western Title Ins. Co.*, 178 Cal.App.3d 1191 (1986). These discussions clearly demonstrate that what the California Supreme Court ruled and what the California Court of Appeal implemented was a drastic reversal of California law, without precedent, and contrary to the reasonable expectations of any landowner on the shores of Lake Tahoe.

No matter what the State now says, the fact remains that the two California courts erroneously relied on *Illinois Central* to transfer private property into public ownership and used *Illinois Central* to justify a departure from previously established law.

THIS "HIGH-STAKES" LITIGATION INVOLVES LAND—NOT WATER!

One of the drastic results of the present posture of this 11-year old "high-stakes"[3] litigation is the taking away of the right of Lake Tahoe shoreline owners to "exclude others" from the land exposed as the water recedes between the high and low water marks on their lakefront property.

In its Brief in Opposition, the State quotes and cites California Constitution Article X, section 4, which relates to the right of the public in the navigable waters of the state. (See Brief in Opposition, p. 2 and 3.) Since the State stops with a mere reference to the section in both instances, one must wonder as to its purpose in citing the section. Perhaps it is to create the erroneous impression that a public right in and to navigable waters includes a right to recreationally use land exposed when the periodic flooding of the shoreline recedes each year.

Although the decision is not mentioned by the State in its Brief in Opposition, if the creation of such an impression be its goal, it should suffice to say that a similar argument was recently rejected by this Court in *Nollan, supra*, slip op. at 7. It seems reasonable to conclude that Justice Brennan would also reject the notion that Article X, section 4, includes not only access to navigable waters but also includes public use of that same land for "picnicking, hunting, fishing, hiking, birdwatching and nature study" in addition to the "preservation of the land in its natural state."

However, whatever be the State's motive in the reference, the Petitioner has never contended that the public did not have a right to exercise what is probably best described as a state navigational servitude in the navigable waters of the state, wherever they may be. That servitude was early recognized in *Bohn v. Albertson*, 107

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[3] Although the State attempts to minimize the burden of California's public trust easement, its real but unexpressed belief as to the extent the public trust easement actually interferes with the owners' right of use and privacy is rather clearly revealed when the State refers to this as "high-stakes litigation". (See Brief in Opposition, p. 10.) Obviously, Petitioner does not quarrel with the State's characterization.

Cal.App.2d 738 (1951). (Cited by the State in footnote 6 at page 17 of its Brief in Opposition.) The relevant point in the *Bohn* decision here, however, is that the owner retained title to the bed and when the waters receded had the right to exclude members of the public from the exposed land. If the State is attributing some implication to this language in the California Constitution that the public has the right to occupy the land of shoreline owners as an adjunct to the use of navigable waters, it should be noted that it has never been so held by any California cases of which Petitioner has knowledge nor has the State cited any such authority. Nor would such a decision be appropriate. The use of navigable waters by the public has a remarkably different impact on the shoreline owner than if the occupants of the craft using those adjacent waters disembark and use the shoreline owner's land for purposes of "picnicking, hunting, fishing, hiking, birdwatching and nature study" as the public has the right to do under the language of *Fogerty I*. The reasonable expectations of the owners most likely included the former, but certainly never the latter.

The only California case cited by the State in support of the implication that any public trust doctrine, even of the unexpanded variety, had ever before applied to non-tidal navigable waters is *People v. Gold Run D & M Co.*, 66 Cal. 138, 151-152 (1884). However, contrary to the State's attempted use of that decision, that early California Supreme Court implicitly rejected the proposition that after the alienation of the "soil" underlying the bed of a navigable river the public retained any rights in the soil itself. The court observed that the state may "by her Legislature, grant it [the soil] to an individual". The court then clearly states that the *inalienable* rights are those relating to the "use of the navigable waters flowing over it" [not the underlying soil].[4] Thus, rather than refute Petitioner's contentions, the only California

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[4] The quotation set forth in the State's Brief in Opposition is followed by a further indication that the Court's concern is with the navigable waters—not the soil: "Any grant of the soil, therefore, would be subject to the paramount rights of the people to the use of the highway." (*Id.* at 152.)

authority cited by the State that has remotely considered the question favors the shoreline owners here.

The State continues its search for a valid and relevant legal theory to support what the California courts have done to the shoreline owners. Before the California Court of Appeal the State argued that the "agreed boundary" doctrine established the landward boundary of the public trust easement. (See TSR Petition, p. 9.) The court of appeal rejected this argument and instead ruled that the *Illinois Central* public trust easement had been acquired by the State by prescription, during the years 1967 through 1971, and precisely fixed its landward boundary at elevation 6228.75 feet. The State now attempts to suggest that somehow the rules relating to ambulatory water boundaries should come into play, apparently recognizing that the essential elements of the doctrine of prescription are missing, as pointed out earlier in the petitions and the amicus brief filed herein. The State's present dilemma as to which theory to now adopt is understandable since one of the essential elements of the doctrine of prescription, that is, hostile use or claim by the claimant, is missing here. No use at all has been shown and no such claim was made by the State until 1977—which, incredibly, was some five years after the public trust easement had been acquired by prescription, according to the court below.

Furthermore, as recently as 1964, the California Attorney General advised, in a published opinion, that the boundaries of a non-tidal navigable lake are "to be established according to its last *natural* elevation, not affected by artificial influence, such as dams or locks." (Emphasis added.) (See 43 Ops. Cal.Atty.Gen. 291, 297 (1964).)

CONCLUSION

The public trust easement created and imposed by the California courts has resulted in the transfer of essential property interests of the shoreline owners to the State. The courts have said that any member of the public has a right to enforce it. The court rulings have destroyed the reasonable expectations of the shoreline owners.

As observed by Justice Brennan in *Nollan, supra*:

> "Where a private land owner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose." (*Id.*, Brennan, J., dissenting, slip op. at 7.)

There is no serious question but that shoreline owners' due process rights were violated by the imposition of a prescriptive easement across their lands and that the judgment below, if allowed to stand, will result in an uncompensated taking.[5]

None of the State's or California courts' theories which have imposed this onerous public trust easement on the shorelines of California lakes and rivers can withstand even superficial constitutional scrutiny. However, unless this Court acts, the shoreline owners of California will have been deprived of valuable and essential property rights by the State in violation of the Constitution.

Respectfully submitted,

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[5] Since this petition does involve the judicial taking issue, Petitioner cannot let go unchallenged the representation by the State that this Court in *Ariyoshi v. Robinson,* 106 S.Ct. 3269-3270, on remand, 796 F.2d 339 (9th Cir. 1986), "rejected similar claims that the courts of our sister states have unlawfully 'taken' property by judicial decree". (See Brief in Opposition, p. 9.) Unless Petitioner is badly mistaken, this Court simply remanded *Ariyoshi* back to the lower courts for further consideration in light of *Williamson County Regional Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985), and did not rule on the substantive issue in that case, i.e., whether a state court violates the constitutional provision against taking property without just compensation when it unpredictably and without precedent reverses long established property law.